United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

77-4057

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Nos. 77–4057, 77–4067, 77 4068, 77–4073, 77–4074, 77–4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petitions for Review of an Order
of the Federal Communications Commission

BRIEF FOR INTERVENORS MCI TELECOMMUNICATIONS CORPORATION and MICROWAVE COMMUNICATIONS INC.

Of Counsel:

JOHN R. WORTHINGTON
MCI Telecommunications Corporation
1150 17th Street, N.W.
Washington, D.C. 20036

MICHAEL H. BADER
KENNETH A. COX
WILLIAM J. BYRNES
RAYMOND C. FAY
Haley, Bader & Potts
1730 M Street, N.W.
Washington, D.C. 20036
(202) 331-0606

Counsel for Intervenors
MCI TELECOMMUNICATIONS CORPORATION
and MICROWAVE COMMUNICATIONS INC.

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BRIEF FOR INTERVENORS MCI TELECOMMUNICATIONS CORPORATION and MICROWAVE COMMUNICATIONS, INC.

QUESTION ADDRESSED IN THIS BRIEF

Did the Federal Communications Commission err in refusing to exempt resellers of communications common carrier services from regulation as common carriers under Title II of the Communications Act of 1934?

PRELIMINARY STATEMENT

In order to avoid unnecessary duplication of arguments covered adequately in the briefs of other parties to this proceeding, Intervenors MCI Telecommunications Corporation and Microwave Communications, Inc. (hereinafter referred to collectively as MCI) have limited this brief to the single question set forth above, in response to the brief filed by the International Business Machines Corporation (hereinafter IBM).

In selecting this one issue, MCI does not intend to suggests that it regard others presented in this proceeding as any less important. MCI in general supports the FCC policy of removing artifical tariff restrictions against the resale and sharing of communications common carrier services in the proceeding below. Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), reconsideration denied in part and granted in part, 62 FCC 2d 588 (1977).

In the MCI Telecommunications Corp. Opposition to Motion of American Telephone and Telegraph Company For a Stay Pending Judicial Review, dated March 11, 1977, MCI stated, for the Court, its position with respect to some of the other issues in this proceeding and it continues to adhere strongly to these views.

ARGUMENT

I. IBM's Position Is Inconsistent with the Fundamental Statutory Scheme for the Protection of the Public

IBM argues that resellers of the services of communications common carriers should not themselves be regulated as common carriers. MCI must take strong exception to this position. The essence of IBM's contention appears to be that common carrier services may be resold on a non-common carrier basis as long as the last seller does not own, or directly operate, the means of transmission. This proposition is totally inconsistent with the statutory scheme Congress created in Title II of the Communications Act of 1934, 47 U.S.C. §§201 et seq., and if ever put into effect, would destroy the regulatory framework Congress envisioned.

There is nothing fundamentally new about the resale of common carrier communication services. As a matter of fact, a number of regulated carriers presently resell other carriers's services. As noted in the decision below (A. 91 , 60 FCC 2d 261, 308 n. 81), Western Union leases a substantial portion of its communications facilities from AT&T. The fact that the reseller has no monopoly services - and, indeed, may compete with the underlying carrier - does not lead to abandonment of regulation. MCI and the other specialized carriers furnish services in competition with AT&T and other telephone companies. See Specialized Common Carrier Services, 29 FCC 2d 870 (1971), reconsideration denied, 31 FCC 2d 1106 (1971), aff'd sub nom. Washington

Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975). Although the specialized carriers have no monopoly services, they are nonetheless regulated as communications common carriers under Title II of the Communications Act. The specialized carriers, the same as Western Union, in some instances resell facilities leased from the Bell System. See AT&T (Docket No. 20099), 52 FCC 2d 727 (1975), aff'd without opinion sub nom. Carpenter v. FCC, 539 F.2d 242 (D.C. Cir. 1976). Lastly, the Commission has certificated a number of value-added carriers which have no transmission facilities of their own but which buy services from the Bell System for resale, with the addition of various augmentative services such as switching, concentrating and data processing. See Packet Communications, Inc., 43 FCC 2d 922 (1973); Graphnet Systems Inc., 44 FCC 2d 800 (1974); Telenet Communications Corp., 46 FCC 2d 680 (1974).

Inherent in Title II of the Communications Act is the Congressional determination that the interests of the public require protection against certain practices sometimes associated with the sale of communications services. For instance, in Section 202 of the Communications Act (47 U.S.C. §202), Congress outlawed unjust or unreasonable discriminations in charges, practices, classifications or regulations in connection with like communications services. Congress provided that charges, practices, classifications and regulations

must be incorporated into tariffs filed with the FCC and must be applicable to all members of the public (47 U.S.C. §203). Congress imposed a duty upon every communications common carrier to furnish service upon reasonable request therefor (47 U.S.C. §201(a)). Congress required that all charges, practices, classifications and regulations must be just and reasonable (47 U.S.C. §201(b)). The public would be deprived of each of these protections as to resale providers of communications services if the requirements imposed by Congress are not applied to them because they are not deemed common carriers.

IBM makes the remarkable argument that the decision to regulate resellers under Title II of the Communications Act is inconsistent with the statement of general purpose in Section 1 of the Communications Act. (Br., p. 21) Section 1 merely states that it is one of the general purposes of all the titles of the Communications Act to regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges...." 47 U.S.C. §151. IBM never really explains how assuring reasonable charges to the public through regulation is inconsistent with that general statement of purpose. There is, indeed, no inconsistency. In Title II, Congress

decided to achieve the general purposes stated in Section 1 by applying the specific regulatory program set forth in Title II to the purveyors of common carrier services.

IBM also argues that treating resellers as common carriers under Title II would impose a heavy regulatory burden twice - once at the time of sale by the underlying carrier to the reseller and then again at the time of resale by the reseller. (Br., p. 22) This argument overlooks the fact that the public buys service only once, and that what is most critical is that the entity which sells directly to the public is prevented from engaging in discriminatory or otherwise unfair pricing conduct. It does not protect the public one whit if the entity from which it purchases services obtained them itself on a fair basis, when that entity is permitted to engage, with respect to its own customers, in conduct that is unjust and inconsistent with the obligation Congress imposed in Title II to protect members of the public in buying communications services.

Hypothetically, for example, if under the theory espoused by IBM, the Bell System were to supply all its present services to a subsidiary which in turn resold them to the public, then that subsidiary would escape all the requirements of Title II of the Communications Act and the public would be deprived of these valuable protections. Congress certainly did not intend that its design for

protecting consumers of communications services could be so easily circumvented. Indeed, AT&T's attempt to employ a rather thinly disguised resale operation (at a time when its tariff purportedly banned resale) as a means of pre-empting MCI's potential market was one of the reasons that caused MCI to file its Petition for Rule Making of June 13, 19[illegible] (A. 425, 442-449), one of the antecedents of the FCC proceeding under review in this appeal. AT&T used two organizations (William F. Hogan Associates, Inc. and Series 11,000, Inc.), with which it had an ill-defined but obviously close relationship, to resell AT&T's services at rates that were inconsistent with AT&T's own normal tariff rates - and which were so low that they would pre-empt business sought by MCI (A. 442). In a letter dated August 20, 1970, the Chief of the FCC's Common Carrier Bureau raised the question as to whether the arrangements for the special AT&T offering involved there ("Series 11,000") "create possibilities of arrangements whereby the customers for the service could act as a common carrier for hire." (A. 444, n. 2). AT&T subsequently abandoned this arrangement and the tariff offering itself.

Even without creating subsidiaries or developing special arrangements with other organizations to resell its services, Western Union could elect to sell a larger portion of its present services outside its tariffs, under IBM's theory,

since those services use transmission facilities leased from Bell. Any carrier could evade its own tariff's limitations, whenever that suited its purpose, simply by buying given circuits from another carrier and reselling them. It is quite likely, if IBM's view were to prevail, that reciprocal arrangements among different carriers would quickly make service under their tariffs the exception rather than the rule - thereby evading the protections Congress has established for the public.

IBM rather lamely suggests that it is not necessary to regulate the rates of resellers because "the rates charged by the underlying carriers, which are subject to strict Commission oversight and control, will determine to a significant degree the rates charged by the resellers." (Br., p. 33) This disingenuous argument tacitly assumes that an industry structure, in which strictly regulated "underlying" carriers, the suppliers of most services, would be competing against unregulated resellers of the same services which would be free to enter the market at will, could in fact continue to exist. It is clear that, given such an industry structure, any underlying carrier would find it in its own self interest to circumvent regulation, in the same fashion as the new entrants, through the expedient of selling its tariffed services to a subsidiary which would then be free to compete on even terms with new entrants by

ignoring every restraint Congress placed on carriers in Title II of the Communications Act. The same result could also be obtained by developing reciprocal resale arrangements with other carriers. Indeed, even in the present industry environment, IBM's naive and unsupported theory has been proven false. For instance, after AT&T filed a tariff revision eliminating its Telpak bulk rates (Tariff Transmittal No. 12714, filed on March 23, 1977), Telenet, a resale value-added carrier, filed a tariff revision (Tariff Transmittal No. 17, filed on April 25, 1977) introducing bulk discount rates of its own for the first time. If major pricing adjustments by a huge carrier like AT&T, moving in the direction of eliminating bulk discounts, is followed by a directly contrary pricing pattern by a small reseller like Telenet, (which leases virtually all its circuits from AT&T), certainly "strict Commission oversight and control" of a small carrier like MCI is going to have no effect on the pricing strategy of a mammoth and unregulated reseller like IBM.

II. Resellers of Communications Facilities Fit the Definition of "Common Carrier"

The term "common carrier" is defined in Section 3(h) of the Communications Act (47 U.S.C. §153(h)) as meaning:

> any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy. . .

This definition is admittedly circular and does not, by its own terms, establish any specific tests as to what constitutes a common carrier for purposes of regulation under Title II of the Act. The definition contained in Section 21.2 of the FCC's Rules, 47 C.F.R. §21.2, is similarly lacking in specific criteria, simply stating that "Any person engaged in rendering communication service for hire to the public" is a communication common carrier.

The Commission, in Industrial Radiolocation Service, 5 FCC 2d 197, 202 (1966), stated:

> (T)he clear legislative intent of Congress in the enactment of the Communications Act of 1934 was that the common carrier regulatory provisions thereof should not apply to persons who are not common carriers in the ordinary sense of the term; that the fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and between such points and the points on the system of other carriers connecting with it; and that a carrier provides the means or ways of communication for the transmission of such intelligence as the customer may choose to have transmitted so that the choice of specific intelligence to be transmitted is the sole responsibility or prerogative of the customer and not the carrier. Frontier Broadcasting Co. et al. v. J. E. Collier et al., 26 FCC 251 (1958). The aforementioned fundamental concept of a communications common carrier applies even though the public offering is limited to a special classification of service which restricts the customer's choice to intelligence permissible within such class of service offering. Western Union Telegraph Co., 5 R.R. 1213 (1950); Charles Edward Stuart, Docket No. 6553, file No. T5-PH 526. See also CATV and TV Repeater Services, 26 FCC 403, 428.

The specific elements of common carriage spelled out by the FCC are (1) the providing for hire of communications facilities, (2) the transmission of intelligence of the design and choosing of the user, and (3) a public offering of service (although the public offering may be limited to a special classification of service). In National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976), the Court found as the essential characteristic implicit in the common carrier concept that carriers undertake to carry for all people indifferently.[1/]

The FCC has long recognized that a common carrier can structured its services as to serve only a limited class of users. See such cases as Press Wireless, Inc., 10 FCC 295 (1944); Press Wireless, 13 FCC 817 (1949); and AT&T, 20 FCC 2d 383 (1969), aff'd sub nom. Associated

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1/ Semon v. Royal Indemnity Co., 279 F.2d 737, 739, (5th Cir. 1960); Home Ins. Co. v. Riddell, 252 F.2d 1, 3 (5th Cir. 1958); Ciaccio v. New Orleans Public Belt R.R., 285 F.Supp. 373, 375 (E.D.La. 1968); State v. Sinclair Pipe Line Co., 180 Kan. 425, 304 P.2d 930, 941 (1957); Utilities Comm. v. Gulf Atlantic Towing Corp., 251 N.C. 105, 110 S.E.2d 886 (1959); Washington ex rel. Stimson Lumber Co. v. Kuykendall, 275 U.S. 207, 211, 48 S.Ct. 41, 72 L.Ed 241 (1927); Terminal Taxicab Co. v. Kutz, 241 U.S. 252, 255, 36 S.Ct. 583, 60 L.Ed 984 (1916); Grace Line, Inc. v. F. M. B., 280 F.2d 790, 792 (2d Cir. 1960); Arrow Aviation, Inc. v. Moore, 266 F.2d 488, 490 (8th Cir. 1959); Circle Express Co. v. Commerce Comm., 249 Iowa 651, 86 N.W.2d 888, 893 (1957); State ex rel. Anderson v. Witthaus, 340 Mo. 1004, 102 S.W.2d 99, 102 (1937); Ferguson Trucking Co. v. Rogers Truck Line, 164 Neb. 85, 81 N.W.2d 915, 922 (1957).

Press v. FCC, 448 F.2d 1095 (D.C. Cir. 1971). There is also ample judicial precedent for the proposition that an entity is a common carrier even though the scope of its offering is limited to a designated class of users or for a specific purpose. See The Pipeline Cases, 234 U.S. 548 (1914); Terminal Taxicab Co. v. Kutz, 241 U.S. 252, 255 (1916); Chicago District Pipeline Co. v. Illinois Commerce Comm'n, 361 Ill. 296, 197 N.E. 873 (1935); United States v. Champlin Rfg. Co., 341 U.S. 290 (1951); National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 642 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).

It is clear that one who leases communications facilities and resells them to the public falls well within these concepts of what makes one a common carrier. Such a reseller is providing communications facilities for hire for the purpose of allowing its customers to transmit intelligence of their own design - and it does so by means of a public offering, though its target may be a special class of communications users. That is enough to make it a common carrier and to bring it within the ambit of Title II of the Communications Act.

III. Title II of The Communications Act Requires That Resellers be Treated as Common Carriers

The fact that an entity leases communications circuits and then resells them does not exempt that entity from the applicability of Section 214 of the Communications Act, 47 U.S.C. §214. Regardless of the manner in which the offeror of circuits obtains in the first instance the circuits offered - whether by construction or by lease from another common carrier - it is clear that the offeror must secure Commission authority for his enterpise. In enacting Section 214, Congress clearly intended the Commission to determine whether each offering of service would be in the public interest. It therefore required the Commission's prior authorization not only for the construction of lines or channels of communication but also for the acquisition or operation of such facilities.

From the beginning, the Commission has consistently interpreted Section 214 of the Communications Act in this way. Only four years after passage of the Act, the Commission determined, in Mackay Radio and Telegraph Company, 6 FCC 562 (1938), that Section 214 authority was necessary in order to extend public telegraph service into a new area by leasing idle circuits from another carrier, observing that any other construction of the statute would defeat its purpose. The Mackay decision did not turn on the fact

that Mackay had already been certificated to provide common carrier service elsewhere. Mackay was required to be certificated for the route in question because its purchase and resale of circuits on that route was a common carrier activity. The fact that an entity proposing such a resale of circuits may have received previous certifications for service elsewhere certainly does not relieve it of the obligation to comply with the requirements of the statute.

IBM attempts to avoid nearly forty years of consistent interpretation of the Communications Act by arguing (Br., pp. 14-16) a very narrow interpretation of the definitions in Section 3 of the Act (47 U.S.C. §153). It points out that Section 3(h) defines a "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy..." It then points to the definition in Section 3(a) and 3(b) of "communication by wire" and "communication by radio." It emphasizes the use in these definitions of the term "transmission", but ignores the fact that the word "services" is broadly construed to include "among other things, the receipt, forwarding, and delivery of communications" - and that the services so defined are "incidental" to the transmission of intelligence by wire or radio. Indeed, in its 1938 decision in Mackay

Radio and Telegraph Company, supra, the Commission made it clear that when Mackay bought circuits from Postal Telegraph Cable Company it was "engaging in transmission." The Commission explained, 6 FCC at 570, that:

> It had no telegraph line between these points but Postal did. Mackay entered into an arrangement for the use of Postal's line by "engaging in transmission over or by means of" a circuit derived therefrom..

If IBM's revisionist reading of the words of the Communications Act were accepted here, it would follow that Mackay would be revised, some thirty-nine years after its issuance, and not only would resellers escape the obligations of Title II of the Communications Act but so also would Western Union and the specialized carriers insofar as they resell circuits obtained from the Bell System.

The Commission explained, In the Matter of Allocation of Frequencies Above 890 Mc/s, 27 F.C.C. 359, 408 (1959), that:

> ....creation of extensive point-to-point cooperative facilities may lead to undesirable situations where the cooperatives have many of the attributes of communication common carriers without assuming the responsibilities of service and the burdens of regulation which apply to common carriers.

Similarly, in Amendment of Parts 87, 89, 91, and 93 of the Commission's Rules to Permit Expanded Cooperative Sharing of Operational Fixed Stations, 4 FCC 2d 406, 419 (1966),

the Commission explained the danger that common carrier operation might develop in the shared private microwave field as follows:

> A shared microwave system can be licensed under existing rules to a company which has a need therefor and is itself eligible and it can render service to other companies on a non-profit, cost-sharing basis. Authorizing a system to an organization that is formed solely for the purpose of operating the system is not desirable because it offers the opportunity to third persons to enter the picture who might be tempted to abuse and commercialize shared microwave systems. For these reasons, that proposal is not adopted.

The Courts have upheld similar agency interpretations that the scope of common carrier regulation must be sufficiently broad to achieve statutory objectives. In United States v. Drum, 368 U.S. 370, 375 (1962), the Supreme Court recognized that the transcendent statutory purposes should not be defeated by formalistic attempts to evade common carrier regulation, observing that:

> Accordingly the statutory definitions, while confirming that a shipper is free to transport his own goods without utilizing a regulated instrumentality, at the same time deny him the use of "for compensation" or "for-hire" transportation purchased from a person not licensed by the Interstate Commerce Commission. Because the definitions must, if they are to serve their purpose, impose practical limitations, upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal.

In Las Vegas Hacienda, Inc. v. Civil Aeronautics Board 298 F.2d 430 (9th Cir. 1962), a hotel which offered a promotional package including hotel accommodations and a "free" air

ride to and from Las Vegas was held to be operating as a common carrier, even though it, like a reseller of communications, was buying and reselling capacity in another carrier's facilities. The Court stated (298 F.2d at 434) that:

> The test which the Board applies is an objective one, relying upon what the carrier does rather than upon the label which the carrier attaches to its activity or the purpose which motivates it. So long as the air carrier is competing commercially in the market for the patronage of the general public, the Board holds that it is immaterial that the service will be attractive only to a limited group; or that it may be performed pursuant to special contract. And it also is immaterial that in terms of the carrier's own bookkeeping the transporation may be furnished at cost, at a loss or even without charge. The Board thus interprets the Act in a way which makes effective economic regulation under the statute possible by bringing within the regulatory scheme all those who compete in the commercial market in the business of offering air transportation to the public generally.

See also Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board, 213 F.2d 814 (9th Cir. 1954); Industrial Gas Co. v. Public Utilities Commission of Ohio, 135 Ohio 408, 21 N.E. 2d 166 (1939); Natural Gas Service Co. v. Serv-Yu Corporative, Inc. 70 Ariz. 235, 219 P.2d 324 (1950).

IV. It Is Immaterial to the Question of Whether Title II Applies That a Reseller Does Not Provide Monopoly Services

IBM argues that because resellers will not be providers of monopoly services, Title II of the Communications Act can be disregarded. (Br., p. 13) Common carrier regulation is not limited to monopolies. The Court noted in National

Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976), that (footnote omitted):

> ...legislation has been upheld imposing stingent regulations of narrous types on entities found to be affected with a public character, even where nothing approaching monopoly power exists. In such cases as the Motor Carrier Act of 1935, relatively competitive carrying industries have been subjected to entry, rate and equipment regulations in the basis of the quasi - public character of the activities involved.

While MCI believes that the non-monopoly nature of the services involved has a substantial bearing upon the way in which the Commission should discharge its responsibilities under Title II, this fact is not, however, a basis for completely ignoring the provisions of Title II. Title II does allow the Commission discretion in applying the statutory norms to different types of common carrier operation. Clearly, a common carrier providing monopoly services essential to the entire public must be regulated in great detail and with the most careful scrutiny of its operations. A carrier providing competitive service to relatively small numbers of the public may, however, be left a large area in which to exercise business judgment - but still remain subject to Title II to the extent necessary to protect the public. IBM points out that in American Satellite Corporation, 55 FCC 2d 1 (1975), the Commission concluded that certain rate changes did not need to be suspended since the carrier involved had no monopoly services and should therefore be

entitled to considerable leeway in developing its offerings. (Br., p. 27) The Commission explained (55 FCC 2d at 2) that:

> Since [American Satellite Corporation] does not offer any basic or so-called "monopoly" services whose users might be burdened as a result of losses in the competitive environment, we find no public interest justification for requiring that rates be fully compensatory at all stages of operations. . . In fostering the development of satellite, as well as terrestrial, specialized common carriers . . . we . . . decided to maintain regulatory flexibility at the outset to encourage such carriers to undertake "service and technical innovation and to provide an impetus for efforts to minimize costs and charges to the public." . . . In adopting this policy we . . . were hopeful also that competition among specialized carriers would obviate some of the need for the kind of strict rate regulation that is necessary in the case of basic or monopoly services.

IBM observes that, in view of the similar business circumstances of American Satellite Corporation and resellers of communications services, the Commission's reasoning as to the former should be applicable to resellers as well. (Br., p. 28) MCI agrees that this decision should be applicable to the operations of resellers. It submits, however, that the Commission did nothing in the decision under review that is in any way inconsistent with its reasoning in American Satellite Corporation. See also Southern Pacific Communications Company, 59 FCC 2d 1116 (1976). Indeed, the Commission explicitly relied upon these two cases below in describing how it would regulate resale carriers. (A. 99,60 FCC2d at 314). Its reasoning in those cases shows that it can apply Title II without imposing undue regulatory burdens upon those classified as common carriers. The basic applicability of Title II to resellers

must be similarly recognized, but the Commission should permit resellers the kind of discretion and flexibility in developing their offerings that it has accorded to American Satellite Corporation and other specialized satellite and terrestrial common carriers.

V. IBM's Freight Forwarder Analogy Is Not Applicable Here

IBM's bases another argument on the highly dubious inferences it draws from rather simplistic analogies to the regulatory treatment of freight forwarders. (Br., pp. 17-21) In General Telephone Co. of Southwest v. United States, 449 F.2d 846, 856 (5th Cir. 1971), it was held that Section 214 of the Communications Act must be interpreted in a different manner than the analogous provision of the Interstate Commerce Act. The Court pointed out that the functions of the Interstate Commerce Commission "are of an entirely different nature than those of the Federal Communications Commission." See also Washington Utilities & Transportation Commission v. FCC, 513 F.2d 1142, 1157 n. 22, (9th Cir.), cert. denied, 423 U.S. 836 (1975).

It is doubtful at best whether direct analogies between the communications and transportation industries can be usefully drawn at all. For instance, it would appear more reasonable to analogize the resellers of communications services to railroad carriers which use the tracks of other railroads -- and sometimes their rolling

stock as well. Indeed, this latter analogy was drawn by the Commission in Mackay Radio and Telegraph Company, 6 FCC at 569-570. It noted that in Transit Commission v. United States, 289 U.S. 121 (1933), the Supreme Court had held that the Long Island Railroad's operation, under a trackage agreement, over the tracks of the Pennsylvania Tunnel and Terminal Railroad Company required certification under the Interstate Commerce Act. IBM argues that there is a critical distinction between resellers of communications services and other communications common carriers in that "resellers do not operate the wires or other apparatus over which the messages or data are transmitted." But neither did the long Island Railroad "operate" the tracks and attendant plant in the Transit Commission case, yet the Supreme Court found it subject to common carrier regulation.

Nonetheless, IBM pursues the analogy to freight forwarders. It should be noted at the outset that freight forwarders are subject to rather substantial common carrier regulation at the present time. IMB's position, however, is that at the time the Communications Act was passed, freight forwarders were not subject to Interstate Commerce Commission regulation. It will be observed that, at that time, neither were motor carriers subject to common carrier regulation by the ICC. Indeed, in its initial form, the Interstate Commerce Act did not even regulate express companies, 1 I.C.C. 677, 682 (1887).

But prior to the enactment of the Interstate Commerce Act, freight forwarders had been held by the courts to be common carriers at common law. Read v. Spaulding, 18 N.Y. Superior Court 395, 404 (5 Bosworth 1859), aff'd, 30 N.Y. 630 (1864); Cownie Glove Co., v. Merchants' Dispatch Transportation Co., 130 Iowa 327, 329, 106 N.W. 749, 750 (1906). Thus in addressing the peculiar needs and problems of the railroad industry during the heyday of railroad company power and expansion in 1887, Congress determined to subject only the railroads to the provisions of the Interstate Commerce Act. In no sense, however, did it change the common law status of freight forwarders as common carriers.

The pre-1934 judicial decisions as to freight forwarders that IBM cites show only that forwarders were held to be "shippers" in their relationship to the railroads. This is entirely consistent with the FCC's view that resellers of communications services are entitled to the same treatment as other users of customers in their relationships to underlying carriers. In Interstate Commerce Commission v. Delaware, L. and W.R.R., 220 U.S. 235 (1911), the question was whether freight forwarders were entitled to the same rates and treatment from the railroads as shippers under the Interstate Commerce Act. Specifically, the question

addressed was "the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry." 220 U.S. at 251. The Court concluded that the "mere ownership of the goods" could not be the test - thus a freight forwarder was held entitled to be treated like a shipper even though it did not own the goods being shipped. This Court should strike down IBM's parallel argument that the "mere ownership" of transmission facilities is the test for whether common carrier regulation should apply.

In reviewing this and similar decisions in 1938, the I.C.C. noted, in its Freight Forwarding Investigation, 229 I.C.C. 201, that "the question whether forwarders in their relation to the public in general, are common carrier agencies upon a set of facts similar to those disclosed on this record was not important in the cases wherein the court held that forwarders were shippers in their relation to the rail lines." The I.C.C. concluded that freight forwarders by railroad normally "possess characteristics of a common carrier in relation to the public." Id.

IBM's reliance on the district court decision in Acme Fast Freight, Inc. v. United States, 30 F. Supp. 968 (S.D.N.Y. 1940), aff'd per curiam, 309 U.S. 638 (1940), is mis-

placed. Acme addressed the construction of the Motor Carrier Act of 1935, and concluded that the statutory definition in what is now 49 U.S.C. §303(a)(14), formerly 49 U.S.C. §203(a)(14), must be read to avoid conflict with other provisions of the Motor Carrier Act, specifically with what is now 49 U.S.C. §306(a)(1), formerly 49 U.S.C. §206(a)(1), which provides that no common carrier by motor vehicle "shall engage in any interstate or foreign operations on any public highway" without a certificate of public convenience and necessity. The court noted that freight forwarders do not operate on public highways when they ship goods through independent motor vehicle contractors and therefore were exempt from the certification requirements of the Motor Carrier Act, 30 F. Supp. at 973. But a decision construing this 1935 statute gives no guidance as to the proper regulation of a different industry governed by a different statute enacted prior to the Motor Carrier Act. There are no words in the Communications Act as limited as "engage in... operations on any public highway." A communication is generally made by an act at one end of a communications path rather than by a continuing act all along the path. Maintenance of the facilities along the communications path is at most analogous to maintenance of highways or railroad trucks. Thus, IBM is drawing inappropriate analogies to a different technology and a different industrial structure. Resellers of communications operate the same kind of facilities and offer the same types of services as existing communications common carriers and should be regulated in the same way.

VI. The FCC Had No Discretion to Exempt Resellers From the Requirements of Title II of the Communications Act Even If It Had Wanted to Do So

The requirements of Title II of the Communications Act are mandatory as to all communications common carriers. The terms of the Act leave no ambiguity as to the mandatory and inclusive nature of its provisions. Section 201 (47 U.S.C. §201), for instance, provides that it "shall be the duty of every common carrier..." to act as there specified. Section 202 (47 U.S.C. §202) provides that it "shall be unlawful for any common carrier..." to engage in the conduct there prohibited. Section 203 (47 U.S.C. §203) provides that "Every common carrier...shall..." comply with its tariff filing requirements. Section 214 (47 U.S.C. §214) provides that "No carrier shall undertake..." to operate without first obtaining the certificate which it requires. All of these statutory standards were clearly established as absolutes. Although the Commission may have discretion in designing ways to apply these standards, it has no discretion to elect not to meet them at all.

The Commission concluded in its decision below (A.99), 60 FCC 2d at 314, that: "It is not sufficient to state that the rates for resale services will be just and reasonable because they will be set according to the going market price in a competitive environment. Regulation is still required to insure that carriers do not employ

predatory rates against each other, and to insure that they treat all customers alike, without giving preferences to large customers, etc." In FPC v. Texaco, 417 U.S. 380, 397 (1974), which the Commission cites in support of the statement quoted above, the Supreme Court stressed that "the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act." In fact, the FPC did not even assert before the Supreme Court in that case that it was free to equate just and reasonable rates with the prices prevailing in the market place. The Court of Appeals had previously ruled that the FPC was not free to do so. Texaco v. FPC, 474 F.2d 416, 422 (D.C. Cir. 1972). And as the Supreme Court noted, the FPC "wisely does not challenge that aspect of the Court of Appeals judgment." 417 U.S. at 394.

Indeed, IBM's proposal in this case is much more inconsistent with the purposes of the governing legislation than was the one the FPC considered in the Texaco case. In Texaco, the basic idea advanced by the agency was twofold: (1) that giving small natural gas producers latitude in pricing would not injure the public because the small producers did not sell directly to the public; and (2) that the agency would continue to regulate closely the prices charged the public by the pipeline companies and large producers for gas initially purchased by them from the

small producers. The notion advocated was that the "consumer would be protected from current excessive rates, but at the expense of the pipeline, rather than the producer..." 417 U.S. at 392. That scheme is, of course, the precise opposite of what IBM proposes here - merely, that the initial producers (the underlying carriers) be strictly regulated but that the entities dealing directly with the public (the resellers) be free to charge what they please. Thus, when the Supreme Court recognized the conceptual possibility of developing a scheme of "indirect regulation of small producers by reviewing pipeline costs of purchased gas providing that [the FPC] insures that the rates paid by pipelines, and ultimately borne by the consumer, are just and reasonable" (417 U.S. at 401), it was not giving any support to the notion advanced here by IBM. Quite the contrary, the Supreme Court's conclusion emphasizes that it is more important to regulate the resellers than it is to regulate underlying carriers in their dealings with resellers.

IBM tries to give a narrow meaning to the Supreme Court's decision in the Texaco case by construing it merely as a reflection of the legislative history of the Natural Gas Act. (Br., pp. 31-32) The decision, however, turned on the terms of the legislation rather than merely upon its legislative history. The legislative history of the Natural Gas Act, in any event, is indistinguishable from

the analogous history of the Communications Act. In both cases, Congress was eager to control "monopolistic forces" in a "heavily concentrated" industry. In both cases the primary goal was protection of the ultimate consumers - and that requires regulation of all common carriers.

IBM's principal basis for seeking to justify its position that the Commission may choose to disregard Title II with respect to resellers, despite the clear ruling of the Supreme Court to the contrary in Texaco, is its distorted construction of several cases dealing with cable television. (Br., pp. 24-27) Cable television service is unlike the services involved in this case. It is a service that has never been subject to common carrier regulation in any of its aspects. At least in the intital phases of cable television's evoluation, it provided the same type of service as is provided by broadcast television stations which are specifically regulated under Title III of the Communications Act, rather than Title II. Indeed, the basic service provided by cable television is simply the retransmission of broadcast signals without alteration. As provided at the present time, cable television service is clearly not a common carrier activity since the cable operator generally exercises control over the content of what is transmitted, whereas in common carriage the nature of the matter transmitted

is determined by the customers. There is thus no question that, as presently constituted, cable television operations are not common carrier activities.

The possibility exists, however, that the fact that a cablecaster can exercise control over what is carried on a substantial number of channels other than those simply retransmitting broadcast signals, may be found to be inconsistent with the basic policy of limiting the degree of control a single entity may exercise over multiple outlets that has, in varying forms, characterized broadcast regulation for decades.[2/] If it is eventually decided, as a matter of public policy, that owners of cable television systems should exercise no control over the content of the channels they provide and operate, it might follow that they would become subject to regulation as common carriers under Title II of the Communications Act.

2/ See, for example, early versions of the multiple ownership rules at 5 Fed. Reg. 2382 (1940); 6 Fed. Reg. 2282 (1941); 8 Fed. Reg. 16065 (1943) and various versions of rules relating to newspaper and broadcast station cross-ownership at 6 Fed. Reg. 1580, 3302 (1940); 9 Fed. Reg. 702 (1944). See also NBC v. United States, 319 U.S. 190, 223 (1943); United States v. Storer Broadcasting Co. 351 U.S. 192 (1956); Multiple Ownership Rules, 2 Pike & Fischer RR2d 1588 (1964); 1965 Policy Statement on Comparative Renewal Hearings, 1 FCC 2d 393, 394; Iacopi v. FCC, 451 F.2d 1142 (9th Cir. 1971). General Telephone Co. of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971); CATV Notice of Proposal Rulemakingand Inquiry, 23 FCC 2d 833 (1970); Multiple Ownership Rules (Docket No. 18110), 50 FCC 2d 1046 (1974), reconsidered, 53 FCC 2d 889 (1975), aff'd in part and rev'd in part sub. nom. National Citizens Committee for Broadcasting v. FCC, No. 75-1064 (D.C. Cir., decided March 1, 1977), petitions for cert. pending sub nom. FCC v. National Citizens Committee for Broadcasting, No. 76-1471, et al.; 47 CFR §73.33; 47 CFR §73.136; 47 CFR §73.236; 47 CFR §73.240; 47 CFR §76.501; 47 CFR §73.636.

The policy judgment whether operation of cable systems should be regulated in a different way than they now are, by preventing the cable owners from exercising control over the subject matter carried, is not itself a judgment under Title II. Rather, it turns on whether, under broad social policies and First Amendment considerations, cable systems should be required substantially to modify thier present method of operation. However, in the event that the Commission - or Congress, which will be considering this issue in connection with the possible complete rewriting of the Communications Act - should make such a judgment, effectuation of that policy decision would then trigger the application of Title II.

In Philadelphia Television Broadcasting Co. v. FCC, 359 F.2d 282 (D.C. Cir. 1966), the Court essentially deferred to the Commission's judgment not to regulate cable operators as common carriers Its brief opinion pointed out that the Commission had undertaken, instead, to regulate cable systems as adjuncts to the nation's broadcasting system, and concluded that this was "a rational and hence permissible choice by the agency." But the position urged by IBM would leave resellers of communications totally unregulated under any provisions of the Communications Act. Clearly, the Court would accord similar deference to the agency's rational decision here, supported by precedent, that resale is a form of common carriage.

In American Civil Liberties Union v. FCC, 523 F.2d 1344, (9th Cir. 1975), the question was whether so-called access channels on cable systems should be subject to common carrier regulation. However, under the Commission rules in question, access channels are required to be offered free of charge to members of the public on a first-come first-served basis, to local educational institutions, and to local governments. There is, therefore, no service "for hire" and thus, under the common law precedents as well as under the express terms of Section 3(h) of the Communications Act, 47 U.S.C. §153(h), there is no common carrier service. Also included in the rules was a requirement for making available at least one access channel for leased use. The users of such channels essentially provide extensions of television broadcast service, and the Commission's design was to use them as a means of promoting greater access to mass media and increased diversity of expression. The use of access channels has been relatively minimal to date and no clear patterns of use have become widely established.[3/]

3/ The Commission's present Rules require the operations of cable television systems to exercise a degree of control over the content of public access programming. 47 C.F.R. §76.256 (d)(1) requires that the cable operator "shall prohibit the presentation of: any advertising material designed to promote the sale of commerical products or services (including advertising by or on behalf of candidates for public office); lottery information;

(Footnote continued on following page)

Both the Commission and the Court recognized a significant measure of merit in the ACLU position in favor of common carrier regulation and indicated, as is pointed out above, that regulation of cable operations may eventually take that direction, 523 F.2d at 1350. The court concluded, however, that the Commission had made a rational choice and that the court should not substitute its judgment for that of the agency and, that at the present point in cable television development, the Commission's regulatory actions were "reasonable ancillary to the effective performance of [its] responsibility for the regulation of television broadcasting" (emphasis added), 523 F.2d at 1351. The Commission was thus permitted to protect the public from misuse of access channels, for the time being, by employing its authority under Title III, rather than Title II, of the Communications Act. The cable television access channel question is thus one that lies in a gray area between two co-equal schemes

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3/ (Footnote continued from proceeding page) and obscene or indecent matter." 47 C.F.R. § 76.256(d)(2) imposes the same obligation to control the content of educational access programming. 47 C.F.R. § 76.256(d)(3) requires the cable operator, with respect to leased access programming to "prohibit the presentation of: lottery information; and obscene or indecent matters." Cable operators do, in fact, exercise such programming control. See, for example, The Wall Street Journal, May 17, 1977, (Eastern Edition) "A TV Star is Porn as X-Rated Movies Get Excited Kavings", page 1, in which an executive of New York's Manhattan Cable TV is quoted as saying that "we review the public access channel so that no X-rated or pornographic material gets on."

of regulation embodied in the same statute. It is sui generis and has no applicability here, where we are dealing with traditional types of communications common carrier services, unrelated to matters treated in Title III, and provided on a basis having all the traditional characteristics of common carriers in the ordinary sense of the term.

The D.C. Circuit concluded, in National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 609 (D.C. Cir. 1976), that two-way non-video communications channels over cable television systems involve common carrier activity, and would normally be subject to state jurisdiction in view of their intrastate character. The Court rejected the notion that State common carrier regulation was pre-empted by the FCC's rules, observing (533 F.2d at 615) that:

> ...this pre-emption does not directly affect transmission in any medium which is of direct concern under the Commission's power over broadcasting. Whereas orgination cablecasting will increase the mix of available viewing choices and thus serve an important general purpose of broadcast regulation, the private nature of the non-video, return communications involved here means that no general broadcast purpose is directly implicated.

Thus when there was no question of interaction with the broadcast purposes of Title III of the Communications Act, as there was in the American Civil Liberties Union case, a non-video use of cable communications was found to be subject to common carrier treatment.

IBM also tries to support its contention that the Commission has discretion to ignore the applicability of Title II by quoting language from the Commission's decision in Computer Use of Communications Facilities, 28 FCC 2d 267, 277 (1971) where the agency said it had latitude to "refrain from subjecting marginal activity to our regulatory process." (Br., p. 26) The "marginal activity" referred to by the Commission in that decision was what it termed "hybrid service", that is a service that combined elements of both data processing, which is not subject to the Communications Act, and communications, which is subject to the Act. As the decision made manifest, there is a rapid convergence taking place between the data processing and communications industries, and it can be very difficult, in some instances, to tell whether a given service should be considered a communications service and thus subject to the Communications Act. The word "marginal", in this context, referred to the marginality of certain services to categorization as communications services. But IBM, in the instant case, is talking about the categorization of what are clearly communications services which have always been treated as common carrier services. It tries to avoid that result not because the service is not communications, but because it claims that the identity of the provider of the service should remove

it from the common carrier classification. The cited authority does not support that conclusion.[4/]

Thus, the relatively difficult policy questions in the cable and computer cases do not exist in the present case. Indeed, the question presented by IBM of whether the Commission has discretion to exempt resellers from common carrier regulation is not even relevant here because the Commission has made it clear that it strongly believes that such regulation of resellers is in the public interest. It is therefore not merely acquiescing in a technical reading of the law, but fully agrees that, on policy grounds, resellers should be treated as subject to Title II. Thus, IBM's argument that the Commission has

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4/ The context of the Commission words cited by IBM was also one where the Commission attempted to exercise some regulatory power short of common carrier regulation over data processing services related to communications. This Court rejected the claim of such authority to regulate non-communication activities in GTE Service Corporation v. FCC, 474 F.2d 724 (2d Cir. 1973), thereby making it clear that the Commission does not have the flexibility it thought it had in treating the marginal services close to the dividing line between communications and data processing.

discretion to refuse to treat resellers as common carriers is largely irrelevant to the present case because, even if it were correct, the agency has exercised that discretion in favor of regulating resellers as common carriers.

Respectfully submitted,

Michael H. Bader
Kenneth A. Cox
William J. Byrnes
Raymond C. Fay

Haley, Bader & Potts
1730 M Street, N.W.
Washington, D.C. 20036
(202) 331-0606

Counsel for Intervenors

MCI TELECOMMUNICATIONS CORPORATION
and MICROWAVE COMMUNICATIONS INC.

Of Counsel:

John R. Worthington
MCI Telecommunications
Corporation
1150 - 17th Street, N.W.
Washington, D.C. 20036

CERTIFICATE OF SERVICE

I, William J. Byrnes, a member of this Court, hereby certify that copies of the foregoing of the brief, in the form prescribed by Rule 32(a) of the Federal Rules of Appellate Procedure, for intervenors MCI Telecommunications Corporation and Microwave Communications, Inc. were served this 25th day of May 1977, by United States mail, postage prepaid, to the parties listed below:

Carole C. Harris, Esq.
Charles M. Meehan, Esq.
Keller and Heckman
1150 - 17th Street, N.W.
Washington, D.C. 20036

Jeremiah Courtney, Esq.
Arthur Blooston, Esq.
Courtney & Blooston
2120 L Street, N.W.
Washington, D.C. 20037

William E. Miller, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

James E. Landry, Esq.
1709 New York Avenue, N.W.
Fifth Floor
Washington, D.C. 20036

Herbert E. Forrest, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Thormund A. Miller, Esq.
Richard S. Kopf, Esq.
James M. Tobin, Esq.
Southern Pacific Building
One Market Street
San Francisco, California 94105

Charles R. Cutler, Esq.
John L. Bartlett, Esq.
Kirkland, Ellis & Rowe
1776 K Street, N.W.
Washington, D.C. 20036

Mahlon M. Frankhauser, Esq.
Michael Yourshaw, Esq.
1776 K Street, N.W.
Washington, D.C. 20006

Joseph E. Keller, Esq.
Wayne V. Black, Esq.
Keller and Heckman
1150 - 17th Street, N.W.
Washington, D.C. 20036

Aloysius B. McCabe, Esq.
Michael Yourshaw
1776 K Street, N.W.
Washington, D.C. 20006

Edward P. Taptich, Esq.
McKenna, Wilkinson & Kittner
1150 - 17th Street, N.W.
Washington, D.C. 20036

Herbert E. Marks, Esq.
Stephen R. Bell, Esq.
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20036

John M. Lothschuetz, Esq.
Carolyn C. Hill, Esq.
1800 K Street, N.W.
Washington, D.C. 20036

Warren E. Baker, Esq.
Post Office Box 11315
Kansas City, Missouri 64112

David R. Anderson, Esq.
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

Robert Michelson, Esq.
Western Union International, Inc.
One WUI Plaza
New York, New York 10004

Donald E. Ward, Esq.
1050 - 17th Street, N.W.
Washington, D.C. 20036

Robert S. Potter, Esq.
Patterson, Belknap & Webb
30 Rockefeller Plaza
New York, New York

Alvin K. Hellerstein, Esq.
Stroock & Stroock & Lavan
61 Broadway
New York, New York 10006

Joseph M. Kittner, Esq.
McKenna, Wilkinson & Kittner
1150 - 17th Street, N.W.
Washington, D.C. 20036

John S. Voorhees, Esq.
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Joel Yohalem, Esq.
Western Union Telegraph Co.
1828 L Street, N.W.
Washington, D.C. 20036

Roy R. Russo, Esq.
Cohn and Marks
1920 L Street, N.W.
Washington, D.C. 20036

Philip M. Walker, Esq.
Telenet Communications Corp.
1666 K Street, N.W.
Washington, D.C. 20006

Werner K. Hartenberger, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20534

The Honorable Griffin B. Bell
Attorney General of the
United States
Department of Justice
Washington, D.C. 20530

Attention: Miss Joen Grant
Room 3114

John Ingle, Esq.
General Counsel's Office
Federal Communications Commissions
1919 M Street, N.W.
Washington, D.C.

Larry S. Solomon
Keller & Heckman
1150 - 17th Street, N.W.
Washington, D.C. 20036

John R. Baskin
Baker, Hostettler & Patterson
1956 Union Commerce Building
Cleveland, Ohio 44115

Howard G. Kristol
Reboul, MacMurray, Hewitt,
Maynard & Kristol
75 Rockefeller, Plaza
New York, New York 10019

Charles Lister, Esq.
Paul J. Berman, Esq.
Covington & Burling
888 - 16th Street, N.W.
Washington, D.C. 20006

Alfred A. Green, Esq.
J. Robert Fitzgerald, Esq.
American Telephone & Telegraph Co.
195 Broadway
New York, New York 10007

Edgar Mayfield, Esq.
American Telephone & Telegraph Co.
Post Office Box 32
Room 46-112
Bedminster, New Jersey 07921

William J. Byrnes

William J. Byrnes